

# Central Asia

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This article reviews legal developments in Turkmenistan, Kazakhstan, and Uzbekistan during 2010 and 2011.

## I. Turkmenistan

As part of the legal reforms initiated by President Gurbanguly Berdimuhamedov to conform the country's legal system to the amended Turkmen Constitution and international conventions, Turkmenistan adopted a number of new laws and amended existing laws during 2011. This section outlines principal changes concerning legislation in Turkmenistan's business sector.

### A. BANKING AND FINANCE

#### 1. *New Currency Law*

The newly adopted law, the Law on Currency Regulation and Currency Control in International Economic Relations (the Currency Law), replaced a 1993 law.

The Currency Law introduces a "freely convertible currency limit" to be established by the Central Bank of Turkmenistan.<sup>1</sup> Residents and non-residents may engage in un-

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1. Law on Currency Regulation and Currency Control in International Economic Relations, art. 1(25) (Bulletin of the Laws of Turkmenistan, Oct. 1, 2011), *available at* [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01ix](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01ix) (Turkm.).

restricted currency operations within this limit.<sup>2</sup> Transactions in excess of the limit require special registration or notification.

Under the Currency Law, the following transactions require registration:

- currency operations between residents and nonresidents in connection with trade credit;
- direct investments;<sup>3</sup>
- loans;
- account trust management; and
- opening foreign bank accounts by Turkmenistan legal entities.<sup>4</sup>

The following transactions require notification to credit institutions of the currency operations carried out between residents of Turkmenistan and nonresidents:

- the purchase of real estate abroad;
- the purchase of exclusive intellectual property rights;
- transactions with share capital that involve less than ten percent of its total value; and
- the opening of foreign bank accounts by Turkmenistan entrepreneur-residents who operate without establishing a legal entity.<sup>5</sup>

The Currency Law specifies registration procedures, establishes exceptions to the requirement to register, and provides the right to challenge a denial in court.<sup>6</sup>

The new Currency Law bolsters the previous law's requirement that obligates residents to repatriate capital gained through transactions with nonresidents by requiring a transaction passport for currency operations under currency agreements<sup>7</sup> with values exceeding the freely convertible currency limit.<sup>8</sup> Nonresidents have an unlimited right to export both the currency that they have imported into the country and the profits gained in their transactions with residents.<sup>9</sup>

The Currency Law also contains detailed provisions applicable to transactions between residents and nonresidents. It allows for the use of any currency in any transaction between residents and nonresidents, except for transferring property and rendering services within Turkmenistan, both of which must use the national currency.<sup>10</sup> Currency operations among nonresidents within Turkmenistan are not limited.<sup>11</sup>

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2. *Id.* art. 1(8) (defining Currency Operations as operations related to the transfer of property rights and other rights in relation to the currency values, as well as using currency values as a means of payment; b) the importing and exporting the currency values to and from the customs territory of Turkmenistan; and c) the transferring of currency values from a person's account outside Turkmenistan to the same person's account in Turkmenistan, and vice versa).

3. *Id.* art. 1(23) (pertaining only to transactions with authorized capital over ten percent of the total value).

4. *Id.* art. 8(2)(1), (2).

5. *Id.* art. 9(2).

6. *Id.* art. 8(3), (7), (8).

7. *Id.* art. 1(15), (29) (defining currency agreement as an agreement, contract, foundation agreement, including amendments made thereof, as well as other documents, on the basis and in execution of which accounts are opened and currency operations are conducted).

8. *Id.* art. 11(5).

9. *Id.* art. 14(1).

10. *Id.* art. 16(1),(3) (providing for cases allowing to pay for such transfer of property and rendering of services in foreign currencies in certain cases; for example, those working under the Petroleum Law, when allowed by Presidential decrees).

11. *See id.* art. 17.

The Currency Law requires natural persons to declare their currency's value when they enter or leave Turkmenistan if the amount exceeds the freely convertible currency limit.<sup>12</sup>

The Currency Law authorizes penalties for noncompliance: fines for 100% of the value of the currency operations are applicable for certain types of violations.<sup>13</sup> Fines of 0.1% per day apply to other types of violations, such as the failure to make timely export or import payments or the failure of residents to repatriate capital within ten days.<sup>14</sup>

## 2. *New Regulations on Credit Agencies and Banking*

Another new law, the Law on the Central Bank of Turkmenistan, replaced a 1993 law. This law confirms the role of the Central Bank of Turkmenistan as the main regulatory authority in the banking sector with the power to implement monetary and credit policy in Turkmenistan.<sup>15</sup>

Turkmenistan has also adopted a law called the Law on Credit Institutions and Banking (the Banking Law), which replaces a 1993 law called the Law on Commercial Banks and Banking. The Banking Law introduces new financial institutions: non-bank credit institutions. It also permits the opening of credit agencies with foreign participation and the opening of branches of foreign banks in Turkmenistan, subject to certain limitations.<sup>16</sup> For instance, foreign banks setting up a branch or an entity in Turkmenistan are required to be financially stable and highly reputable.<sup>17</sup> The Central Bank of Turkmenistan will establish quotas for foreign capital participation in the banking sector of Turkmenistan and set criteria for foreign banks entering the local market.<sup>18</sup>

## 3. *Microfinance*

The newly adopted law, the Law on Microfinance Institutions and Microfinance, supports small and medium-sized businesses. The law establishes a framework for microfinance, subject to licensing by the Central Bank of Turkmenistan. Foreign legal and natural persons (except for those registered offshore) are now allowed to engage in microfinance in Turkmenistan.<sup>19</sup>

## B. EMPLOYMENT LAW

### 1. *Legal Status of Foreign Nationals in Turkmenistan*

The newly adopted law, the Law on Legal Status of Foreign Citizens (the Foreign Nationals Law) in Turkmenistan replaced a 1993 law and removes the concept of perma-

12. *Id.* art. 18(5).

13. *Id.* art. 36(2)(1).

14. *Id.* art. 36(2)(2)(b), (c).

15. See Law on the Central Bank of Turkmenistan, art. 5 (Bulletin of the Laws of Turkmenistan, Apr. 4, 2011), available at [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01hu](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01hu) (Turkm.).

16. See Law on Credit Institutions and Banking, art. 9(1) (Bulletin of the Laws of Turkmenistan, Apr. 4, 2011), available at [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01hv](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01hv) (Turkm.).

17. *Id.*

18. *Id.* art. 9(2).

19. Law on Microfinance Institutions and Microfinance, art. 5(4) (Bulletin of the Laws of Turkmenistan, May 21, 2011), available at [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01if](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01if) (Turkm.).

nent residency.<sup>20</sup> It creates two categories of foreign nationals: (1) those who are residing in the territory of Turkmenistan based on a residence permit, and (2) those who are on a temporary stay.<sup>21</sup> Foreign nationals in both categories are generally guaranteed the same rights and freedoms as Turkmen nationals, and have the same obligations as Turkmen nationals. Under the Foreign Nationals Law, foreign nationals holding residence permits are entitled to reside in the territory of Turkmenistan, own houses or other property,<sup>22</sup> and be employed<sup>23</sup> by entities and organizations in Turkmenistan. Foreign nationals temporarily staying in Turkmenistan have the right to be employed based on a work permit, provided that their labor activities are consistent with the purposes of their visits.

## 2. *The Law of Turkmenistan on Migration*

The recent changes to the Law on Migration (the Migration Law) introduced a number of amendments applicable to foreign nationals entering, leaving, and staying in Turkmenistan. In particular, clarifications were added to the residence permit issuance procedures, as well as to permit extension and renewal procedures.<sup>24</sup> Hence, the latest amendment made to the Migration Law created a new requirement that a person must continuously reside in Turkmenistan for a minimum period of two years when applying for a resident's permit based on the grounds set forth in the law.<sup>25</sup> It also introduced new amendments that clarify issuance of residence permits to children under the age of sixteen.<sup>26</sup> Among other changes, the new amendments reduced the length of time from one year to six months that persons may reside outside of Turkmenistan before their residence permits are annulled.<sup>27</sup>

## C. OTHER DEVELOPMENTS IN THE BUSINESS ENVIRONMENT

### 1. *Oil and Gas*

Recent changes to the law of Turkmenistan called the Law on Hydrocarbon Resources (the Petroleum Law) clarify licensing regulations and regulations related to the importation and use of explosive materials and substances. The amendments require contractors to obtain a permit for conducting explosive activities and for importing, purchasing, and using explosive substances and materials.<sup>28</sup> The amendments also provide the President of Turkmenistan with the power to implement 1) customs procedures for the importation

20. See Law on the Legal Status of Foreign Citizens in Turkmenistan, art. 5 (Bulletin of the Laws of Turkmenistan Mar. 26, 2011), available at [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01hw](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01hw) (Turkm.).

21. *Id.* art. 5.

22. *Id.* art. 12.

23. *Id.* art. 7 (indicating foreign nationals are restricted in holding certain positions that can only be held by nationals of Turkmenistan).

24. Law on Amendments to the Law "On Migration," art. 14 (Bulletin of the Laws of Turkmenistan, 2011), available at [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01el](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01el) (Turkm.).

25. *Id.* art. 14(2).

26. *Id.* arts. 14(4), 16(2).

27. *Id.* art. 16(1).

28. Law on Hydrocarbon Resources, art. 44(4) (Bulletin of the Laws of Turkmenistan, Aug. 20, 2008, as amended Aug. 5, 2011), available at [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01iy](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01iy) (Turkm.).

and clearance of materials used for petroleum operations and 2) procedures for exporting certain portions of petroleum.<sup>29</sup>

## 2. *Licensing and Certification*

Several changes were made to the Law on Licensing of Certain Types of Activities, some of which were introduced in support of recent legal developments on the prevention of economic crimes. Thus, the law now obligates license holders to comply with internal control requirements for the purposes of preventing money-laundering and financing terrorism.<sup>30</sup> Among several other amendments, a provision establishing a new ground for refusal to issue a license was incorporated in the law: the cancellation of a license may now be grounds for refusing to reissue that license for one year following the date of cancellation.<sup>31</sup>

## 3. *Economic Crimes*

The recent amendments to the Law on Prevention of the Legalization of Income Gained by Illegal Means and Financing of Terrorism are aimed to improve the work of financial and other institutions and to strengthen the “know your customer” requirements.<sup>32</sup> The amendments set forth certain restrictions and requirements that disclosing persons<sup>33</sup> must comply with when dealing with states and officials.<sup>34</sup> It also requires verification of information and documents provided by clients.<sup>35</sup> The amendment allows the Authorized State Body<sup>36</sup> to suspend transactions for (i) an unlimited period of time when the Body possesses information that one of the parties to a transaction is involved in terroristic activities; (ii) up to five working days when there are grounds for suspecting a party to a transaction is involved in money-laundering activities; and (iii) up to thirty days when requested to do so by a foreign state’s competent authority.<sup>37</sup> The amendments require that any natural persons and legal entities carrying out transactions that involve monetary assets and other property must comply with the requirements of the Authorized State Body regarding suspension of such transactions.<sup>38</sup> The amendment exempts parties to a suspended transaction from civil liability for non-compliance with their contractual terms.<sup>39</sup> The amended law also obligates several additional regulatory authorities to cooperate with the Authorized State Body and comply with the Body’s requirements.<sup>40</sup>

29. *Id.* art. 47(4).

30. Federal Law on the Licensing of Certain Types of Activities, art. 11(4) (Bulletin of the Laws of Turkmenistan, 2008), available at [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01ik](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01ik) (Turkm.).

31. *Id.* art. 12(8).

32. The Federal Law of Turkmenistan on Introducing the Changes and Amendments to the Anti-money Laundering Law and Financing of Terrorism (Bulletin of the Laws of Turkmenistan, Aug. 15, 2011), available at [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01iu](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01iu) (Turkm.).

33. *Id.* art. 1.7.

34. *Id.* art. 3.5.

35. *Id.* art. 3.4.

36. *Id.* art. 8.4.

37. *Id.* art. 6.3.

38. *Id.* art. 3.11.

39. *Id.*

40. *Id.* art. 8.4.

Turkmenistan also introduced criminal liability for manipulation of the securities market<sup>41</sup> and for insider trading activities<sup>42</sup> by incorporating relevant articles into the Criminal Code of Turkmenistan.

## II. Kazakhstan: International Arbitration And Mediation

The Law on Amendments to Various Legislative Acts on Issues of Immunity of State and Its Property, Development of Arbitral Tribunals and International Commercial Arbitration Practice introduced amendments to the Civil Code of the Republic of Kazakhstan, the Civil Procedural Code of the Republic of Kazakhstan, the Law on International Commercial Arbitration, and the Law on Arbitral Tribunals.

### A. SOVEREIGN IMMUNITY

The Civil Code now affords the Republic of Kazakhstan and its property jurisdictional immunity in legal relations with foreign parties. The immunity extends to judicial immunity, immunity from provisional measures, and immunity from enforcement of judicial acts. The immunity could be waived by international treaties, written agreements, declaration, or written notification.<sup>43</sup> Notably, the new provision on immunity under the Civil Code appears to have extraterritorial effect and might not apply in practice because foreign domestic laws or international treaties generally govern such jurisdictional issues. But the new rule on sovereign immunity is linked to the immunity of foreign states in Kazakhstan, and now courts of Kazakhstan may assert judicial jurisdiction over a foreign state if the foreign state does not respect Kazakhstan's immunity.<sup>44</sup>

Practically speaking, however, the new rule on immunity of Kazakhstan is limited. In 2009, Kazakhstan's Parliament ratified the UN Convention on Jurisdictional Immunities of States and Their Property, which provides for certain limitations on state immunity.<sup>45</sup>

A foreign state generally enjoys jurisdictional immunity including judicial immunity, immunity from provisional measures, and immunity from enforcement of judicial acts.<sup>46</sup> The Civil Procedural Code expressly limits judicial immunity if a foreign state (i) conducted an activity other than effectuation of sovereign powers; (ii) consented to waive its judicial immunity; (iii) previously violated the right to jurisdictional immunity of the Republic of Kazakhstan and its property;<sup>47</sup> or (iv) acted in other specific ways listed in Arti-

41. Criminal Code of Turkmenistan, art. 2451 (Bulletin of the Laws of Turkmenistan June 12, 1997, as amended Aug. 15, 2011), available at [http://www.turkmenistan.gov.tm/\\_ru/laws/?laws=01it](http://www.turkmenistan.gov.tm/_ru/laws/?laws=01it) (Turkm.).

42. *Id.* art. 2501.

43. Civil Code of the Republic of Kazakhstan, art. 1102 (Supreme Council of the Republic of Kazakhstan, 1994), available at [http://e.gov.kz/wps/wcm/connect/7445eb8047cf353ca189b7ec00953609/K940001000\\_20110325.htm?MOD=AJPERES&CACHEID=7445eb8047cf353ca189b7ec00953609&useDefaultText=0&useDefaultDesc=0](http://e.gov.kz/wps/wcm/connect/7445eb8047cf353ca189b7ec00953609/K940001000_20110325.htm?MOD=AJPERES&CACHEID=7445eb8047cf353ca189b7ec00953609&useDefaultText=0&useDefaultDesc=0).

44. Civil Procedural Code of the Republic of Kazakhstan, arts. 33, 159(1), 428 (Supreme Council of the Republic of Kazakhstan, 1999), available at [http://e.gov.kz/wps/wcm/connect/3671310047cf846285789df79045eedb/K990000411\\_20110325.htm?MOD=AJPERES&CACHEID=3671310047cf846285789df79045eedb&useDefaultText=0&useDefaultDesc=0](http://e.gov.kz/wps/wcm/connect/3671310047cf846285789df79045eedb/K990000411_20110325.htm?MOD=AJPERES&CACHEID=3671310047cf846285789df79045eedb&useDefaultText=0&useDefaultDesc=0) (Kaz.).

45. See United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Art. 10, U.N. Doc. A/RES/59/38 (Dec. 2, 2004).

46. Civil Procedural Code of the Republic of Kazakhstan, art. 427.

47. *Id.* art. 428.

cles 435 through 441 of the Civil Procedural Code. Likewise, a foreign state does not enjoy immunity from provisional measures on enforcement if the property of the foreign state that is located within the territory of the Republic of Kazakhstan is used or designated for use for purposes other than effectuation of sovereign powers of that foreign state.<sup>48</sup> The immunity is waived if the foreign state consents in written form to arbitrate disputes and it agrees to waive judicial immunity with respect to such arbitrations.<sup>49</sup>

## B. INTERNATIONAL ARBITRATION

The Law on International Commercial Arbitration governs international commercial arbitration in the Republic of Kazakhstan. The law applies to disputes that arise out of contracts containing arbitration agreements between individuals and legal entities if at least one of the parties is a non-resident of the Republic of Kazakhstan.<sup>50</sup> It also governs procedures for recognition and enforcement of international arbitral awards in the Republic of Kazakhstan.<sup>51</sup>

### 1. *Exclusive Arbitral Jurisdiction*

Under the Commercial Arbitration Law, arbitration agreements establish exclusive arbitral jurisdiction. If, despite the existence of the arbitration agreement, a claim is filed with state court, the state court, upon the request of a party, shall terminate the proceeding and compel the parties to arbitrate.<sup>52</sup>

### 2. *Waiver of Objections*

The February 5, 2010 Amendments introduced “the waiver of the right to object.”<sup>53</sup> Under this provision, a party waives objections if it continues participating in an arbitral proceeding after learning of non-compliance with the Law.<sup>54</sup>

### 3. *Qualification of Arbitrators*

The Law imposes requirements for arbitrators. The arbitrator shall not be interested in the outcome of the case, shall be independent of the parties, must agree to act as an arbitrator, must be no less than twenty-five years old, and must have a higher education. Pursuant to the February 5, 2010 Amendments, an individual may not be an arbitrator if he is: (1) a deputy of the Parliament of the Republic of Kazakhstan, (2) a deputy of the *maslikhat* (a local state representative body) acting on a permanent or free basis paid at the expense of the state budget, or (3) a military servant.<sup>55</sup>

48. *Id.* art. 442.

49. *Id.* art. 432.

50. Law on International Commercial Arbitration, art. 6, cl. 4 (Supreme Council of the Republic of Kazakhstan, 2004, amended on Feb. 5, 2010), available at <http://www.arbitrage.kz/152> (Kaz.).

51. *Id.*

52. *Id.* art. 6-1.

53. *Id.* art. 4-1.

54. *Id.*

55. *Id.* art. 7, cls. 1, 2, 4.

#### 4. *Choice of Law*

Article 26 of The Law establishes that the arbitration tribunal shall decide a dispute in accordance with the law chosen by the parties. Any choice of law or legal system of a given state shall be construed as directly referring to only the substantive law of that state and not to its conflict of laws rules. If the parties have not reached an agreement on applicable law, the arbitration court shall determine the applicable law in accordance with the legislation of the Republic of Kazakhstan. In the absence of rules governing a specific legal relationship, the arbitration court shall decide the dispute in accordance with the customary business practices applicable to the given transaction.<sup>56</sup>

#### 5. *Other Provisions*

The February 5, 2010, Amendments also introduced new provisions relating to the following:

1. Powers of the arbitral tribunal to decide on the provisional measures to secure the claim (Article 15-1);
2. Initiation of arbitral proceedings (Article 19);
3. Participation of the parties in the hearings (Article 25-1);
4. Representation and examination of evidence (Article 25-2); and
5. Counter-claims and offsetting counter-claims (Article 25-5).

A chapter on conduct of arbitral proceedings became more detailed.<sup>57</sup> The period for amendment and interpretation of the award and rendering of an additional award increased from thirty to sixty calendar days.<sup>58</sup> The February 5, 2010 Amendments are designed to bring the Law in compliance with the UNCITRAL Model Law on International Commercial Arbitration.

#### 6. *Setting Aside the Award*

The Law provides for means to set aside an arbitration award. An award may be set aside based on an exhaustive list of grounds that is provided in Article 31.<sup>59</sup> The list divides grounds for setting aside arbitration awards into two groups: (1) grounds that must be proven by a petitioner seeking to set aside an arbitration award and (2) grounds that are applied upon the initiative of the court.

The first group of grounds relates to the arbitration agreement or procedural rights of the parties. The award shall be set aside if a party proves that the arbitration decision was rendered in connection with a dispute not contemplated by, or not falling within the terms of, the parties' arbitration agreement. Likewise, an award shall be set aside if it is based on decisions on matters beyond the scope of the parties' arbitration agreement or if the dispute is not arbitrable. In addition, an award can be set aside if the petitioning party was not given proper notice of the appointment of an arbitrator, the arbitral proceedings, or the composition of the arbitration court. An award can also be set aside if the arbitral procedure was not in accordance with the agreement of the parties and arbitration rules, a

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<sup>56</sup> *Id.* art. 26, cl. 3.

<sup>57</sup> *Id.* ch. 5.

<sup>58</sup> *Id.* art. 30.

<sup>59</sup> *Id.* art. 31.



party to the arbitral proceedings was declared legally incapable, or the arbitration agreement was not valid under the law to which the parties subjected it.

The second group of grounds permits setting aside the award if the award is in conflict with the public policy of the Republic of Kazakhstan or if the matter in relation to which the award was issued is not arbitrable under the laws of the Republic of Kazakhstan.<sup>60</sup>

If an award is not set aside, it is binding and shall be enforced in accordance with the civil procedure legislation of the Republic of Kazakhstan.<sup>61</sup>

### C. THE LAW ON MEDIATION

As part of a major campaign to improve law enforcement activity and the judicial system<sup>62</sup> in the Republic of Kazakhstan, Kazakhstan's Parliament adopted the Law on Mediation<sup>63</sup> (the Law) on January 28, 2011. The Law went into effect on August 5, 2011. To implement the Law, the Parliament introduced corresponding changes to some of the major legislative acts of the Republic,<sup>64</sup> including the Civil Code,<sup>65</sup> Code of Civil Procedures,<sup>66</sup> Criminal Code,<sup>67</sup> and Code of Criminal Procedures.<sup>68</sup>

The Law's enactment was an important step in 1) promoting alternative methods of dispute resolution<sup>69</sup> as a way of reducing the workload of courts<sup>70</sup> and 2) introducing new methods of dispute resolution, such as mediation. Although the concept of "mediation" was not unknown<sup>71</sup> to the Republic, the Law, among others, expressly defined certain terms including "mediation;" determined the scope of mediation; defined mediation and settlement agreements; and established the requirements for mediators.

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60. *Id.*

61. *Id.* art. 32.

62. See On Measures for Increasing Effectiveness of Law Enforcement Activity and Judicial System of the Republic of Kazakhstan, Presidential Decree, No. 1039 (2009), available at <http://www.inform.kz/rus/article/2295346> (Kaz.).

63. On Mediation, Law No. 401-IV (2011), available at <http://www.pavlodar.com/zakon/?dok=04918&ogl=all> (Kaz.).

64. On Introduction of Changes and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Mediation, Law No. 402-IV (2011), available at <http://www.pavlodar.com/zakon/?dok=04919&all=all> (Kaz.).

65. Civil Code (1994), available at [http://online.prg.kz/Document/Default.aspx?doc\\_id=1006061](http://online.prg.kz/Document/Default.aspx?doc_id=1006061) (Kaz.).

66. Code of Civil Procedures, Law No. 411-I (1999), available at [http://online.prg.kz/Document/Default.aspx?doc\\_id=1013921](http://online.prg.kz/Document/Default.aspx?doc_id=1013921) (Kaz.).

67. Criminal Code, Law No. 167-I (1997), available at [http://online.prg.kz/Document/Default.aspx?doc\\_id=1008032](http://online.prg.kz/Document/Default.aspx?doc_id=1008032) (Kaz.).

68. Code of Criminal Procedures, Law No. 206-I (1997), available at [http://online.prg.kz/Document/Default.aspx?doc\\_id=1008442](http://online.prg.kz/Document/Default.aspx?doc_id=1008442) (Kaz.).

69. The other widely used method for the resolution of disputes in Kazakhstan is arbitration. See, e.g., International Commercial Arbitration, Law No. 23-3 (2006), available at <http://www.pavlodar.com/zakon/?dok=03081&ogl=all> (Kaz.).

70. See Interview with Judge of the Bostandyksky Court of Almaty City (Mar. 5, 2011), available at <http://www.zakon.kz/213248-zakon-o-mediicii-kak-alternativa-sudam.html>.

71. In the 19th century, parties to a dispute actively used Courts of Biis. Bii was a person, usually well-known and respected in the society, who acted as a "mediator" between the disputing parties. See Zimanov S., *Ten Examples of Decisions of Biis* (2008), [http://online.prg.kz/Document/Default.aspx?doc\\_id=30450930](http://online.prg.kz/Document/Default.aspx?doc_id=30450930).

### 1. *Mediation and the Scope of Mediation*

The Law defines mediation as "a procedure of settlement of dispute (conflict) between the parties with the assistance of mediator (mediators) with a view of achievement of the mutual acceptable decision by them, realized under the voluntary consent of the parties."<sup>72</sup> The Law requires mediation to comply with the following principles: voluntariness, party equality, mediator independence and impartiality, non-interference with the mediation process, and confidentiality.<sup>73</sup>

The scope of mediation is broad and covers disputes arising out of civil, labour, family and other relations ("civil law"),<sup>74</sup> as well as criminal matters involving crimes of minor and average gravity (as defined by the Criminal Code),<sup>75</sup> unless otherwise excluded by Kazakhstani Laws.<sup>76</sup> The Law, however, expressly excludes from the scope of mediation disputes that may affect the rights of third parties not participating in the mediation or the rights of legally incompetent persons,<sup>77</sup> disputes involving governmental agencies, and disputes involving corruption or other crimes against the interests of state services and state governance.<sup>78</sup>

### 2. *Mediation and Settlement Agreements*

To initiate the mediation, the parties must execute<sup>79</sup> a written mediation agreement<sup>80</sup> that contains all the material terms, which, among others, includes the subject of the dispute, information about the mediator, and the language that will be used during the mediation proceedings.<sup>81</sup>

The execution of the mediation agreement has some important procedural consequences for civil law disputes. Upon the execution of the agreement, the statute of limitations interrupts and, after interruption, it begins running anew.<sup>82</sup> The Law, however, leaves open the question as to what would happen with the statute of limitations if the mediation agreement is declared void. For example, a defect in bringing a lawsuit generally does not interrupt the statute of limitations, which creates a risk for a plaintiff that the statute of limitations may lapse before the claim can be re-filed.<sup>83</sup> In any event, a mediation agreement should not be executed on the very last day of the statute of limitations period.

72. On Mediation, art. 2(5).

73. *Id.* art. 4.

74. Mediation of civil, labor, and family matters has its own peculiarities; however, for the purposes of this article and when the procedure is the same, they are all characterized as "civil law" matters.

75. Criminal Code, art. 10.

76. On Mediation, art. 1(1).

77. *Id.* art. 1(2).

78. *Id.* art. 1(3), (4).

79. Mediation is a voluntary process and nobody can be compelled to mediate. If a party requests the other party to mediate, a failure to reply within ten days by the other party, unless the other reasonable term was specified by the offer, is treated as a refusal to mediate. *See id.* art. 20(6).

80. Mediation agreement means "the written agreement of the parties concluded with mediator with a view of the resolution of dispute (conflict) prior to the beginning mediation." *Id.* art. 2(7).

81. The exceptional list of material terms is provided for in art. 21(2).

82. Civil Code, art. 183.

83. *Id.* art. 184(1).

Parties to a dispute may execute a mediation agreement before referring the dispute to the court or during the court proceedings.<sup>84</sup> The Law does not establish a time limit within which the parties may refer their dispute to mediation. Thus, mediation can take place at any time,<sup>85</sup> even when the parties have already proceeded into the merits of the case in court.<sup>86</sup>

Upon resolution<sup>87</sup> of the dispute,<sup>88</sup> the parties must execute a settlement agreement that outlines the settlement reached during the mediation and stipulates other terms.<sup>89</sup>

The procedural aspects of enforcing settlement agreements reached in civil disputes concluded before court proceedings were initiated and agreements reached during court proceedings are different. In the first instance, the settlement agreement will be a contract<sup>90</sup> subject to performance and remedies for breaches as would any other contract. In the second instance, the agreement is subject to the court's approval and will be enforced like a judicial decree.<sup>91</sup> The court, when approving the settlement agreement, will issue a judicial decree incorporating the terms of the settlement.<sup>92</sup> The decree will come into force after ten days unless appealed by a party.<sup>93</sup> When the judicial decree takes effect, the court will issue an enforcement order.<sup>94</sup> The effect of this order is that officers of justice may enforce it compulsorily if any party refuses to perform under the settlement agreement.<sup>95</sup>

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84. Civil and criminal mediations differ in some important procedural aspects. For example, a commenced mediation with respect to civil law disputes will suspend all proceedings pending the resolution of the dispute, whereas criminal law mediation will not suspend criminal proceedings. See On Mediation, art. 23(3); Criminal Code, art. 67(1). In addition, criminal mediation is part of a "reconciliation process" between the victim and the perpetrator. It requires the perpetrator not only to reconcile with the victim but also to compensate for the harm caused. See On Mediation, art. 24(1); Criminal Code, art. 67(2).

85. For example, with respect to arbitration, a party seeking arbitration should request the judge to stay the proceedings and compel the arbitration at the initial state of the proceedings; otherwise, the right to compel arbitration will be waived. See Code of Civil Procedures, art. 249(5); see also International Commercial Arbitration, art. 6-1.

86. Moreover, mediation can take place after a party appeals the decision rendered by the trial court. See Code of Civil Procedure, arts. 342, 383-11.

87. The Law imposes specific time-frames for the resolution of disputes by means of mediation. If it is a civil law matter, resolution must be reached within thirty days. In some instances, by the agreement of the parties, the mediation may be extended for another thirty days. Mediation as part of criminal proceedings must comply with all terms provided for by the Criminal Procedural Code related to pre-trial proceedings and judicial proceedings. See On Mediation, arts. 23(2-3), 24(4).

88. Settlement of the criminal dispute is the basis for release from criminal liability with respect to crimes of minor or average gravity and the basis for the judge to terminate criminal proceedings. See Criminal Code, art. 67(1-2); Code of Criminal Procedure, art. 391(5).

89. On Mediation, art. 27(2).

90. See *id.* art. 27(4).

91. Code of Civil Procedure, art. 193(3).

92. *Id.*

93. *Id.* arts. 235(1), 344(4).

94. *Id.* art. 236(2).

95. See On Enforcement Proceedings and the Status of Officers of Justice, Law No. 261-IV, art. 11(1) (2010), available at [http://online.prg.kz/Document/Default.aspx?doc\\_id=30617206](http://online.prg.kz/Document/Default.aspx?doc_id=30617206) (Kaz.).

### 3. *Mediators*

Under the Law, a mediator is an individual who is independent, impartial, listed in the registry for mediators, and does not have an interest in the outcome of the case.<sup>96</sup> The Law puts significant emphasis on the impartiality of the mediator and requires the mediator to refuse to mediate if any circumstances affect his or her impartiality.<sup>97</sup> Moreover, a mediator must resign from the mediation if he or she cannot mediate pursuant to the required principles of mediation described in Section I of this Article.<sup>98</sup> But the Law does not give a party the right to remove the mediator. Generally, the parties must agree to remove the mediator.<sup>99</sup> Absent an agreement to remove the mediator or the mediator's resignation, a possible option for a party seeking to avoid a certain mediator might be to abandon the mediation or refuse to sign a settlement agreement.

Mediators can be professional or non-professional. A professional mediator must have higher education, be at least twenty-five years of age, have a mediation certification, and be listed in the registry for professional mediators.<sup>100</sup> A non-professional mediator must be at least forty years of age and be listed in the registry for non-professional mediators.<sup>101</sup> The parties to a dispute may establish additional requirements for a mediator by agreement.<sup>102</sup>

## III. Uzbekistan

Foreign companies that plan to operate in Uzbekistan should be aware that lack of proper tax and legal planning may expose them to a number of significant tax and legal risks. Uzbek withholding tax is an important consideration for a foreign company engaged in business with an Uzbek counterpart. For example, in a situation where a foreign company sells equipment to an Uzbek company and the sale includes installation, testing, and start-up of the equipment, there is a concern for withholding tax when the Uzbek buyer makes a payment to its foreign counterpart.

Pursuant to the Tax Code of the Republic of Uzbekistan, an Uzbek buyer, at the time of payment, will be required to withhold the twenty-percent withholding tax.<sup>103</sup> The tax, however, will not apply if: (a) the foreign company is exempt from the Uzbek taxation under an applicable tax treaty;<sup>104</sup> or (b) the foreign company provides to its Uzbek counterpart a written confirmation issued by the state tax inspectorate of the applicable district that it had been registered as an Uzbek permanent establishment.<sup>105</sup> These exceptions are discussed further below.

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96. On Mediation, arts. 2(2), 9(1).

97. *Id.* art. 7(2).

98. *Id.* art. 12(2).

99. *Id.* art. 12(1).

100. *Id.* art. 9(4).

101. *Id.* art. 9(3).

102. *Id.* art. 9(8).

103. TAX CODE OF THE REPUBLIC OF UZBEKISTAN [Tax Code], art. 160(4), available at <http://www.public.finance.uz/en/codex/>.

104. *Id.* art. 155.

105. *Id.*

## A. TAX TREATY EXEMPTION

Uzbekistan is a party to tax treaties with forty-nine countries.<sup>106</sup> To obtain a tax treaty exemption, a foreign company is required to file an application with the State Tax Committee of Uzbekistan.<sup>107</sup> The application should include a tax residence certificate from the competent fiscal authority of the foreign company.<sup>108</sup> Filing an application with the required set of documents does not always result in issuance of the exempt status by the State Tax Committee. In some instances, the State Tax Committee rejects applications made by foreign companies based on technical reasons<sup>109</sup> or based on the Committee's interpretation of tax treaty provisions, which may or may not be correct.<sup>110</sup> These decisions of the State Tax Committee are difficult to appeal in court.<sup>111</sup> Because the appeal process can be time consuming and expensive, it might be practically impossible to obtain an exemption from the twenty-percent withholding tax based on the tax treaty.

## B. PERMANENT ESTABLISHMENT

A permanent establishment is a practical option for a foreign company wishing to conduct business in Uzbekistan, but hoping to avoid the harsh consequences of the potentially misapplied tax treaty exemption. The Tax Code broadly defines "permanent establishment" as "any [place] through which a [foreign legal entity] carries out entrepreneurial activity in the Republic of Uzbekistan, including activity carried out through an authorized person."<sup>112</sup> A permanent establishment is also created if a foreign company is engaged in activities of a preparatory and auxiliary nature or when a foreign company provides certain personnel services and specific activities via agents.<sup>113</sup> In addition, exemptions from the permanent establishment status can be found in relevant tax treaties.<sup>114</sup>

106. See *Uzbekistan Highlights 2012*, DELOITTE, [http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Taxation%20and%20Investment%20Guides/2012/dtd\\_tax\\_highlight\\_2012\\_Uzbekistan.pdf](http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Taxation%20and%20Investment%20Guides/2012/dtd_tax_highlight_2012_Uzbekistan.pdf) (last visited Feb. 16, 2012).

107. TAX CODE, art. 155.

108. *Id.*

109. For example, a Turkish company obtained a Turkish tax residence certificate signed by the local Turkish tax authorities while the tax treaty with Turkey provided for the Turkish Ministry of Finance as a competent authority.

110. The author is aware of cases when officers of the State Tax Committee interpreted treaties contrary to the generally accepted international tax principles (*e.g.* OECD commentaries), partly due to a limited number of tax experts and limited knowledge of English.

111. Despite the right of appeal granted to foreign companies by the Tax Code, based on the experience of Colibri Law Firm lawyers, Uzbek courts have a limited number of experts in tax law to consider such cases. See TAX CODE, art. 122.

112. *Id.* art. 20.

113. The Tax Code identifies specific activities via agents as implementation of activities through an independent intermediary—broker, commissioner, professional participant of securities market, or any other person (legal entity or individual) acting under the contract of commission or other similar agreement, and who is not authorized to sign contracts on behalf of the foreign legal entity. See *id.*

114. For instance, in relation to construction, the Uzbekistan-Malaysia tax treaty will treat the construction activity to be a permanent establishment when it exceeds a twelve month period. Whereas the construction in Uzbekistan is viewed to be a permanent establishment from its inception. See *id.*

### 1. *Permanent Establishment Registration*

Generally, the process for registration of permanent establishment proceeds relatively smoothly.<sup>115</sup>

### 2. *Permanent Establishment Taxation*

Uzbek law treats a foreign company operating as a permanent establishment as a domestic taxpayer. As such, the permanent establishment must pay the following Uzbek taxes: (a) corporate income tax;<sup>116</sup> (b) net profits tax;<sup>117</sup> (c) unified social payment;<sup>118</sup> (d) property tax;<sup>119</sup> and (e) land tax.<sup>120</sup>

#### a. Corporate Income Tax

The current Uzbek corporate income tax is assessed at nine percent on net income determined by the Uzbek accounting and taxation rules. Most of the issues arise with respect to the attribution of revenues and allocation of expenses to a permanent establishment.<sup>121</sup> Unfortunately, the Tax Code provides only limited guidance.<sup>122</sup> In the absence of a detailed rule and its interpretation, the Uzbek tax authorities tend to tax any revenues sourced from Uzbekistan and deny deduction of any expenses that have not been incurred inside the country. While the corporate income tax rate itself is relatively low, denial of deductions could lead to a much higher actual corporate income tax. The Tax Code also includes a provision that the taxable base of a permanent establishment for Uzbek corporate income tax purposes should not be less than ten percent of its total expenses.<sup>123</sup> Pursuant to such provision, a foreign company must determine whether the actual tax base for Uzbek corporate income tax is higher than ten percent of the company's total expenses. If the actual Uzbek corporate income tax base is less than ten percent of the company's total expenses, then the taxpayer is required to calculate and pay tax from the latter amount.

#### b. Net Profit Tax

Based on the Tax Code, the tax base for Uzbek net profit tax is net income attributable to the permanent establishment less Uzbek corporate income tax. The current rate of the Uzbek net profit tax is ten percent.<sup>124</sup> Similar to a corporate income tax, and due to lack of a detailed rule and procedure, the Uzbek tax authorities will attempt to tax any revenue sourced from Uzbekistan.

115. Based on information collected by the Colibri Law Firm, at least one permanent establishment per month is registered in Uzbekistan.

116. TAX CODE, art. 126.

117. *Id.* art. 154-7.

118. *Id.* art. 305.

119. *Id.* art. 147.

120. *Id.* art. 279.

121. *Id.* art. 154.

122. In cases of equipment sale to an Uzbek counterpart and further servicing, a foreign company may face complications in determining whether the whole revenue or only the Uzbek part of it should be accounted for under the Tax Code.

123. TAX CODE, art. 154.

124. *Id.*

### c. Unified Social Payment

The Tax Code lists Uzbek permanent establishments as payers of the unified social payment.<sup>125</sup> The tax base for the unified social payment is the gross remuneration of the permanent establishment's employees.<sup>126</sup> There are certain items that are deductible from the tax base. For example, per diems in excess of the statutory norms and car compensation payments can be deducted.<sup>127</sup> The current rate of the unified social payment is twenty-five percent.<sup>128</sup>

### d. Property Tax and Land Tax

There have not been any major recent issues or developments regarding property and land tax in Uzbekistan. These taxes are assessed on the permanent establishment's taxable property and land.<sup>129</sup>

## 3. *Permanent Establishment: Tax Agent Responsibilities*

A permanent establishment is deemed to be a tax agent.<sup>130</sup> Thus, when individuals or foreign companies deal with permanent establishments, they should withhold from those entities and remit to the Uzbek state budget all of the applicable Uzbek taxes. Note that there is no withholding requirement when the permanent establishment makes the payment to its own parent company overseas. This resolves the issues with the twenty-percent withholding tax discussed above.

## 4. *Permanent Establishment: Tax Reporting*

In addition, an Uzbek permanent establishment is responsible for tax reporting.<sup>131</sup> Many foreign and domestic entities are able to comply with tax reporting requirements without significant complications.

## 5. *Permanent Establishment: Tax Settlements*

The Uzbek local tax authorities do not have foreign currency bank accounts. Therefore, a permanent establishment will be required to open a bank account with the Uzbek commercial bank to make tax settlements.

Despite the aforementioned issues, operating in Uzbekistan via a permanent establishment structure could be a viable option for a foreign company. To benefit from it, foreign companies need to properly analyze and assess all of the risks and develop the most efficient and comprehensive operational structure for itself.

125. *Id.* art. 305.

126. *Id.* art. 306.

127. *Id.* art. 171.

128. Resolution of the President of the Republic of Uzbekistan No. PP-1449, On Prognosis of the Basic Macroeconomic Indexes and Parameters of the National Budget of the Republic of Uzbekistan for the year 2011, Jan. 24, 2010 (Russ.), available at [http://fmc.uz/legisl.php?id2=pp\\_1449](http://fmc.uz/legisl.php?id2=pp_1449).

129. Property tax is established at the rate of 3.5%, whereas land tax rates depend on the location of the land. See *id.*

130. TAX CODE, art. 165.

131. *Id.* art. 154.

## C. NEW DEVELOPMENTS IN TAX LEGISLATION

On January 1, 2011, the Uzbek government introduced a number of amendments to its tax legislation that mostly affect small-sized businesses.<sup>132</sup> These amendments mainly changed rates for certain categories of taxes.<sup>133</sup> The most important changes are discussed below.

1. *The Unified Tax Payment For Small Businesses*

Small companies in Uzbekistan are now subject to the unified tax payment (UTP), which replaced the following corporate taxes:

- Corporate income tax;
- Social infrastructure development tax;
- VAT;
- Turnover charges; and
- Property tax.<sup>134</sup>

The UTP is assessed on gross revenue of a small company.<sup>135</sup> The UTP rates usually vary depending on the company's type of business. For service and production companies, for example, the rate is six percent.<sup>136</sup> The rate for trading and wholesale companies varies from one to five percent, and for companies providing catering services may vary from eight to ten percent.<sup>137</sup>

Effective July 1, 2011, the Uzbek government introduced a so-called "minimum amount" of the UTP.<sup>138</sup> This minimum amount is calculated as triple the amount of land tax charged on the land actually used by the taxpayer.<sup>139</sup>

Therefore, small companies are now required to compare their tax liabilities from actual sale proceeds with the triple amount of land tax assessed on the land used.<sup>140</sup> The higher of either tax will be the amount the small company will have to pay to the Uzbekistan tax authorities as its minimum amount of the UTP.<sup>141</sup>

The changes in the minimum UTP were introduced to deal with potential tax evasions.<sup>142</sup> Consequently, the Uzbek government forces small companies to pay a flat tax amount, irrespective of any possible manipulations with sales. Nevertheless, these changes negatively affect those small companies that commonly have larger land plots for their businesses, such as manufacturing.

132. See Resolution of the President of the Republic of Uzbekistan No. PP-1449, *supra* note 128.

133. For example, there was a twenty percent indexation of land tax rates. TAX CODE, art. 286.

134. *Id.* art. 349.

135. *Id.* art. 355.

136. See Resolution of the President of the Republic of Uzbekistan No. PP-1449, *supra* note 128.

137. *Id.*

138. Resolution of the Ministry of Finance of the Republic of Uzbekistan No. 44, On the Introduction of Amendments to Regulations on a Procedure for Calculation and Discharge of Single Tax Payment Taking into Consideration Introduction of a Minimum Amount of Single Tax Payment, July 26, 2011 (Russ.), *available at* [http://fmc.uz/legisl.php?id2=enp\\_minim](http://fmc.uz/legisl.php?id2=enp_minim).

139. *Id.*

140. Calculated based on the established tax rate as applied to the land area in use and multiplied by three.

141. See Resolution of the Ministry of Finance of the Republic of Uzbekistan No. 44, *supra* note 138.

142. Information collected by Colibri Law Firm lawyers from the Uzbek tax authorities.